

Case 3:08-cv-00014-PJH CIVIL COVER SHEET Document 1 Filed 01/02/2008 Page 1 of 9

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

I.(a) PLAINTIFFS

Elisangela Da Silva

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

San Mateo

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Robert B. Jobe, Law Office of Robert B. Jobe, 550 Kearny St., Ste. 200, SF CA 94108, 415-956-5513

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input checked="" type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF
(For diversity cases only) AND ONE BOX FOR DEFENDANT)

	PTF	DEF	PTF	DEF	
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

<input checked="" type="checkbox"/> Original Proceeding	<input type="checkbox"/> Removed from State Court	<input type="checkbox"/> Remanded from Appellate Court	<input type="checkbox"/> Reinstated or Reopened	<input type="checkbox"/> Transferred from Another district (specify) _____	<input type="checkbox"/> Multidistrict Litigation	<input type="checkbox"/> Appeal to District Judge from Magistrate Judgment
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V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 510 Agriculture	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 352 Personal Injury Med Malpractice	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers Liability	<input type="checkbox"/> PERSONAL PROPERTY	<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth In Lending	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 160 Stockholders Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	LABOR	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 390 Other	SOCIAL SECURITY	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 720 Labor/Mgmt Relations	<input type="checkbox"/> 894 Energy Allocation Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motion to Vacate Sentence Habeas Corpus:	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 791 Empl.Ret. Inc. Security Act	<input checked="" type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant)	
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 445 Amer w/ disab - Empl	<input type="checkbox"/> 555 Prison Condition		
	<input type="checkbox"/> 446 Amer w/ disab - Other			
	<input type="checkbox"/> 480 Consumer Credit			
	<input type="checkbox"/> 490 Cable/Satellite TV			

VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Mandamus and Venue Act (28 U.S.C. § 1361); Administrative Procedure Act (5 U.S.C. § 702), Civil Action (28 U.S.C. §§ 1331, 2201, 2202)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION DEMAND \$_____ CHECK YES only if demanded in complaint:
UNDER F.R.C.P. 23JURY DEMAND: YES NOVIII. RELATED CASE(S) PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE
IF ANY "NOTICE OF RELATED CASE".IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)
(PLACE AND "X" IN ONE BOX ONLY) SAN FRANCISCO/OAKLAND SAN JOSE

DATE

SIGNATURE OF ATTORNEY OF RECORD

1/2/08

OP-104-2 PH 1:44
CLERK'S OFFICE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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5 Attorney for Plaintiff.

6
 7 UNITED STATES DISTRICT COURT FOR THE
 8 NORTHERN DISTRICT OF CALIFORNIA

9 ELISANGELA DA SILVA,

No.

10 Plaintiff,

11 v.

12 EMILIA BARDINI, DIRECTOR, SAN
 13 SAN FRANCISCO ASYLUM OFFICE;
 14 EMILIO T. GONZALEZ, DIRECTOR, USCIS;
 15 MICHAEL CHERTOFF, SECRETARY,
 DEPARTMENT OF HOMELAND SECURITY;
 MICHAEL B. MUKASEY, U.S. ATTORNEY
 GENERAL,

16 Defendants. } COMPLAINT FOR A WRIT OF
 17 } MANDAMUS AND
 18 } DECLARATORY AND
 19 } INJUNCTIVE RELIEF

20 USCIS Alien Number: 99-783-947

21
 22 **COMPLAINT FOR A WRIT OF MANDAMUS**
 23 **AND DECLARATORY AND INJUNCTIVE RELIEF**

24 By and through her undersigned attorney, Plaintiff, ELISANGELA DA SILVA ("Ms. Da
 25 Silva"), as and for her complaint, alleges as follows:

26
 27 **PRELIMINARY STATEMENT**

28 1. Ms. Da Silva is a native and citizen of Brazil who filed an application for asylum
 with the U.S. Citizenship and Immigration Services on or about August 9, 2006. On August 30,
 2006, Ms. Da Silva was interviewed on the merits of that application by the San Francisco
 Asylum Office. Since that time, Ms. Da Silva's application for asylum inexplicably remains
 pending. This action seeks to compel the adjudication of the application for asylum filed by Ms.
 Da Silva.

JURISDICTION

2. Jurisdiction over the subject matter of this civil action is conferred on this Court by 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1361, as a civil action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to Plaintiff; 5 U.S.C. § 702, as a challenge to agency action under the Administrative Procedure Act (“APA”); and 28 U.S.C. §§ 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

INTRA DISTRICT ASSIGNMENT

3. Because a substantial portion of the events that gave rise to this lawsuit occurred in the County of San Francisco, this case should be assigned to the Court's San Francisco division.

VENUE

4. Venue is properly in this district, where Ms. Da Silva resides, where a substantial part of the events or omissions giving rise to the claim occurred, and where the witnesses pertinent to this action are most likely to be found. 28 U.S.C. § 1391(e); 8 U.S.C. § 1447(b) (venue proper in the “district court for the district in which the applicant resides”).

PLAINTIFF

5. Ms. Da Silva is a native and citizen of Brazil who currently resides at 529 Rollins Rd. #C, Burlingame, California 94010. Although the Attorney General is required to reinstate a 2003 removal order against Ms. Da Silva – and thereafter allow her an interview with an asylum to determine if she has a reasonable fear of returning to her native country – the Defendants have refused to do so, leaving Ms. Da Silva in legal limbo in the U.S.

DEFENDANTS

6. Emilia Bardini is the Director of the San Francisco Asylum Office and is sued herein in her official capacity. In this capacity, she is directly responsible for processing asylum application filed within the jurisdiction of the San Francisco Asylum Office.

7. Emilio T. Gonzalez is the Director of the USCIS and, as such, has been delegated the authority to direct the administration of the USCIS, and to enforce the INA and all other laws relating to the immigration and naturalization of non-citizens. Defendant Gonzalez is sued herein in his official capacity.

8. Michael Chertoff, the Secretary of the Department of Homeland Security, is sued herein in his official capacity. As the head of the executive Department which houses the USCIS agency, Secretary Chertoff is “charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens, except insofar as [the INA] or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers.” INA § 103(a)(1), 8 U.S.C. § 1103(a)(1).

9. Michael B. Mukasey, Attorney General of the United States, is sued herein in his official capacity. In that capacity, the Attorney General represents the United States in legal matters generally and gives advice and opinions to the heads of the executive departments of the Government when so requested. He also has responsibility for providing access to criminal history record information pursuant to INA § 104(g), 8 U.S.C. § 1103(g), and INA § 105(b), 8 U.S.C. § 1105(b).

FACTS

10. Ms. Da Silva was born on April 6, 1975 in Pilar de Goias, Goiania, Brazil. After being brutally raped by the Brazilian police on account of her sexual orientation, Ms. Da Silva fled Brazil and attempted to seek refuge in the U.S. On October 9, 2003, when Ms. Da Silva attempted to enter the U.S. using fraudulent documents and a false name, she was

1 apprehended by the Department of Homeland Security ("DHS") and summarily removed to
 2 Mexico, pursuant to INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

3 11. On October 22, 2003, Ms. Da Silva re-entered the U.S. without inspection via
 4 Laredo, Texas. By re-entering the U.S. illegally after having been previously removed from the
 5 U.S., Ms. Da Silva rendered herself subject to "reinstatement of removal" pursuant to INA §
 6 241(a)(5), 8 U.S.C. § 1231(a)(5), which provides:

7 If the Attorney General finds that an alien has reentered the United States illegally
 8 after having been removed or having departed voluntarily, under an order of removal,
 9 the prior order of removal is reinstated from its original date and is not subject to
 10 being reopened or reviewed, the alien is not eligible and may not apply for any relief
 11 under this chapter, and the alien *shall* be removed under the prior order at any time
 12 after the reentry.

13 (Emphasis added). *See also* 8 C.F.R. § 241.8.

14 12. Although a final reinstatement order triggers the bar to relief in INA § 241(a)(5), 8
 15 U.S.C. § 1231(a)(5), DHS has determined that withholding of removal under INA § 241(b)(3), 8
 16 U.S.C. § 1231(b)(3), is not a form of relief because it is mandatory, not discretionary.¹ Thus, if a
 17 person expresses a fear of return during the reinstatement process, the regulations provide for an
 18 interview with an asylum officer. If an asylum officer determines that the person has a
 19 "reasonable fear of persecution or torture," she may apply for withholding of removal before an
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 22
 23 ¹ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), mandates that:

24 the Attorney General *may not* remove an alien to a country if the Attorney General
 25 decides that the alien's life or freedom would be threatened in that country because
 26 of the alien's race, religion, nationality, membership in a particular social group, or
 27 political opinion.

28 (Emphasis added).

1 immigration judge. 8 C.F.R. §§ 241.8(a) & (e), 208.31.

2 13. On August 9, 2006, Ms. Da Silva filed an application for asylum with the U.S.
3 Citizenship and Immigration Services, based on the past persecution she suffered at the hands of
4 the Brazilian police, and her fear of future persecution, on account of her sexual orientation. On
5 or about August 30, 2006, Ms. Da Silva was interviewed by a San Francisco Asylum Officer in
6 regards to her application for asylum. If DHS reinstates her prior removal order, Ms. Da Silva
7 will not be eligible for asylum. However, upon reinstatement of her prior removal order, Ms. Da
8 Silva will receive an interview with an asylum officer and, if the asylum officer determines that
9 she has a "reasonable fear of persecution or torture," Ms. Da Silva may apply for withholding of
10 removal before an immigration judge. 8 C.F.R. §§ 241.8(a) & (e), 208.31.

11 14. Despite the fact that Ms. Da Silva is subject to reinstatement of removal and the
12 Attorney General *shall* order her removed under the prior order, Ms. Da Silva remains in legal
13 limbo, awaiting an opportunity to undergo a reasonable fear interview and present her application
14 for withholding of removal before an immigration judge.

15 15. Although more than sixteen months years have lapsed since Ms. Da Silva filed
16 her application for asylum, and since she was interviewed on the merits of that application,
17 Defendants have taken no action to reinstate Ms. Da Silva's removal order or allow her an
18 opportunity to demonstrate her "reasonable fear of persecution or torture." Nor have Defendants
19 adjudicated her application for asylum. As a result, Ms. Da Silva's legal status in the U.S.
20 remains uncertain.

21 16. Defendants' willful delay in reinstating Ms. Da Silva's removal order clearly
22 contravenes DHS's duty to act on a nondiscretionary, mandated reinstatement of removal within
23

1 a reasonable period of time. As a result of this delay, Ms. Da Silva's legal status remains
2 uncertain.

3 17. This civil action seeks a writ of mandamus ordering Defendants to immediately
4 reinstate Ms. Da Silva's prior removal order and provide her with a reasonable fear interview
5 with an asylum officer.

6 18. Ms. Da Silva has exhausted any administrative remedies that may exist. No other
7 remedy exists for Ms. Da Silva to resolve Defendants' refusal to comply with their regulatory
8 obligations within a reasonable period of time.

9 19. Defendants' illegal action has kept Ms. Da Silva in an uncertain legal status.
10 Because Defendants have neglected the requirement that they reinstate Ms. Da Silva's removal
11 order, Ms. Da Silva is unable to demonstrate her reasonable fear of persecution or torture to an
12 asylum officer and subsequently apply for withholding of removal before an immigration judge.

13 20. Ms. Da Silva has suffered, and will continue to suffer, irreparable injury for which
14 she has no adequate remedy at law. If the relief prayed for is not granted, Ms. Da Silva will
15 suffer continued extreme individual hardship.

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19 **FIRST CAUSE OF ACTION**
20 **(Mandamus)**

21 21. Plaintiff repeats, alleges, and incorporates paragraphs 1 through 20 above as
22 though fully set forth herein.

23 22. Defendants have the nondiscretionary duty to reinstate Ms. Da Silva's prior
24 removal order and provide Ms. Da Silva with an interview with an asylum officer to determine if
25 she has a "reasonable fear of persecution or torture." By failing to do so, Defendants are, quite
26 27
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1 simply, failing to comply with their statutory and regulatory duties. Plaintiff is entitled,
2 therefore, to relief in the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel
3 Defendants to reinstate her previous removal order.
4

5 **SECOND CAUSE OF ACTION**
6 (Violation of the Administrative Procedure Act)

7 23. Plaintiff repeats, alleges, and incorporates paragraphs 1 through 22 above as
8 though fully set forth herein.

9 24. Plaintiff is a person aggrieved by agency action under the Administrative
10 Procedure Act, 5 U.S.C. §§ 701 *et seq.* By failing to reinstate Ms. Da Silva's prior removal
11 order and provide Ms. Da Silva with an interview with an asylum officer to determine if she has
12 a "reasonable fear of persecution or torture," Defendants have acted arbitrarily and capriciously
13 and have "unlawfully withheld or unreasonably delayed" agency action in violation of 5 U.S.C. §
14 706.
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28 Complaint for a Writ of Mandamus

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that this Court:

(1) Accept jurisdiction over this action;

(2) Declare Defendants' failure to reinstate Ms. Da Silva's prior removal and provide Ms. Da Silva with an interview with an asylum officer to determine if she has a "well-founded fear of persecution or torture" to be a violation of 8 U.S.C. § 1231(a)(5), the Administrative Procedure Act, and 28 U.S.C. § 1361;

(3) Order the Defendants to immediately reinstate Ms. Da Silva to her previous position as a U.S. Citizenship and Immigration Services (USCIS) Asylum Officer.

- (3) Order the Defendants to immediately reinstate Ms. Da Silva's prior removal order and provide her with an interview with an asylum officer to determine if she has a "reasonable fear of persecution or torture;"
- (4) Grant attorney's fees and costs of court under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and other authority; and
- (5) Grant such other and further relief as this Court deems just and proper under circumstances.

DATED: January 2, 2008

Respectfully submitted

Robert B. Jobe, Esq.
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Attorney for Plaintiff